No. 92-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RUTH O. SHAW, *et al.*,
Appellants

v.

WILLIAM BARR, *et al.*,
Appellees

Appeal from the United States District Court for the Eastern District of North Carolina

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BRIEF AMICI CURIAE ON BEHALF OF THE DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC LEGISLATIVE LEADERS ASSOCIATION, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, AND DEMOCRATIC GOVERNORS' ASSOCIATION IN SUPPORT OF THE APPELLEES

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICI CURIAE

The *amici* consist of the Democratic National Committee and related Democratic Party organizations. All the *amici* have an interest in the issues presented in this case.

State legislators and Governors have the primary responsibility in the redistricting process. Any decision by this Court that impacts the redistricting process affects how legislators and Governors carry out their responsibilities. Members of Congress represent these districts and are directly affected by redistricting plans. Congress adopted the Voting Rights Act, 42 U.S.C. § 1973 (1982),

to ensure that the right to vote is not denied or abridged on account of race or color and it is of interest to the Congress that the Act is not weakened. The Democratic National Committee has an interest in ensuring that all citizens have a right to equally participate in the political process and that our legislative halls reflect the diversity of our society.

The *amici* urge this Court to affirm the decision of the district court. This Court has recognized that voting is a fundamental right. To provide that all Americans may freely exercise this right, the legally appropriate use of racial criteria in the districting process is essential. An affirmation would ensure the continued diversity in Congress and the State Legislatures. On the other hand, a reversal of the lower court's decision has the potential to significantly disrupt the political process. The validity of all majority minority districts would be placed in jeopardy.

Pursuant to Rule 37 of the Supreme Court of the United States, written consent of all the parties was requested for the filing of this brief as *amici curiae*. Written consent has been granted and the letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

In the interest of brevity, the *amici* adopt the statement of the case set forth in the brief of the state appellees.

SUMMARY OF ARGUMENT

1. A state legislature's pretextual intent to comply with the Voting Rights Act, 42 U.S.C. § 1973 (1982), and the Attorney General's preclearance under § 5 of the Act does not preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent. Nevertheless, there is no evidence that the congressional redistricting plan adopted by the North Carolina General

Assembly evidenced invidious discriminatory intent. The plan fairly recognized minority voting strength and did not deny white voters an equal opportunity—on a statewide basis—to participate in the political process. In addition, North Carolina's use of racial criteria is benign and not inconsistent with this Court's recent pronouncements on the use of racial preferences.

2. North Carolina's creation of two congressional districts was pursuant to a legitimate state policy that sought to recognize African-American communities of interest without unduly disrupting existing congressional districts and their incumbents. Since legislatures are better situated to determine state policy, a court's review of such policy should be extremely limited. A court should look no further than to determine whether the proffered state policy is rational and whether the plan is in compliance with federal and state law.

3. Federal law does not require that congressional districting plans comply with any neutral criteria. Therefore, uncouth or irregularly shaped districts are not in and of themselves legally suspect. If a jurisdiction decides to recognize a community of interest, a court may not reject the jurisdiction's decision for failing to comply with some aesthetic norm.

4. The 1990 redistricting process led to enormous gains in the number of minority elected officials. However, the continued diversity of our Nation's legislatures is threatened by this pending claim. If the district court's decision is reversed the validity of countless minority districts will become suspect. The disruption to the political process would be enormous as numerous challenges to existing districts would be sure to follow.

ARGUMENT

I. ALTHOUGH A STATE LEGISLATURE'S PRETEXTUAL INTENT TO COMPLY WITH THE VOTING RIGHTS ACT AND THE ATTORNEY GENERAL'S PRECLEARANCE UNDER § 5 DOES NOT PRECLUDE A FINDING THAT A REDISTRICTING PLAN WAS ADOPTED WITH AN INVIDIOUS DISCRIMINATORY INTENT, THE APPELLANTS CANNOT ESTABLISH SUCH AN INTENT.

This Court has directed the parties to address the following question:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

61 U.S.L.W. 3418 (Dec. 7, 1992).

The language of the Voting Rights Act, 42 U.S.C. § 1973 (1982), and judicial precedent clearly indicate that a state legislature's pretextual intent to comply with the Voting Rights Act and the Attorney General's preclearance under § 5 of the Act does not preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent. Nevertheless, the appellants cannot establish that the congressional redistricting plan adopted by the North Carolina General Assembly evidenced invidious discriminatory intent.[1]

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[1] Unlike the appellees in *Quilter v. Voinovich*, 794 F. Supp. 695, 794 F. Supp. 756, 794 F. Supp. 760 (N.D. Ohio 1992), *appeal pending, sub nom. Voinovich v. Quilter*, No. 91-1618, the *Shaw* appellants did not allege that the legislature's intent to comply with the Voting Rights Act was pretextual or violated § 2 of the Act. In addition, in *Voinovich*, the district court found that the Ohio Apportionment Board intentionally used race to dilute the voting strength of African-American voters in violation of the Voting Rights Act and the Fifteenth Amendment.

When the Voting Rights Act was adopted in 1965 Congress was well aware that several states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). To avoid "massive resistance" through manipulation of State electoral laws, Congress required that "covered jurisdictions"[2] submit and receive preclearance of any electoral change from either the United States District Court for the District of Columbia or the Attorney General of the United States.

A determination by the Attorney General to either reject or preclear an electoral change does not preclude further proceedings. If the Attorney General interposes an objection, a jurisdiction can seek a declaratory judgment in the District Court for the District of Columbia. *See Beer v. United States*, 425 U.S. 130 (1976); *City of Petersburg v. United States*, 410 U.S. 962 (1973), *summarily aff'g*, 354 F. Supp. 1021 (D.D.C. 1972). Alternatively, if the District Court grants a declaratory judgment or if the Attorney General declines to interpose an objection, private litigants are free to mount a *de novo*

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[2] Jurisdictions covered under § 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1982), and therefore subject to the preclearance requirements of § 5 were: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and 40 counties in North Carolina. 30 Fed. Reg. 9897 (1965). Subsequent amendments to the Act resulted in the coverage of additional jurisdictions: Alaska, Arizona, Texas and several counties or towns in California, Florida, Michigan, New Hampshire, New York and South Dakota. 28 C.F.R. 51.67 (1987).

attack upon an electoral change. Section 5 of the Voting Rights Act provides:

> Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

42 U.S.C. § 1973c (1982). This language clearly indicates that Congress did not intend to preclude a finding that a redistricting plan was adopted with an invidious discriminatory intent if the plan was precleared by the Attorney General.

In *Major v. Treen*, 574 F. Supp. 325 (E.D.La. 1983), a three-judge district court invalidated a congressional redistricting plan previously precleared by the Attorney General. The plaintiffs alleged that the congressional plan had a discriminatory effect on African-Americans in violation of amended § 2 of the Voting Rights Act and was intentionally designed to minimize and dilute minority voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution. *Id.* at 327. The court held that the plan violated amended § 2 of the Voting Rights Act but declined to rule on the intentional discrimination claim.[3] However, the court did note some evidence in support of the contention that the plan was adopted with a racially discriminatory purpose—the opposition of the Governor to the creation of a majority African-American congressional district. The court explained that the Governor's concerns:

[3] The court explained that "given our conclusion that Act 20 results in a dilution of black voting strength, we need not draw the ultimate inference of purposeful discrimination from the composite of factors heretofore outlined. The court has nevertheless taken into account, as but one aspect of the totality of circumstances, the evidence that opposition to the creation of majority black districts was responsible, to a significant extent, for the defeat of the Nunez Plan and the substitution of Act 20." *Major*, 574 F. Supp. at 355 n.39.

> were restricted to the aggregation of blacks within one district; the coalescence of whites was not regarded as ominous so long as Congressman Livingston's chances for re-election were maximized. An Orleans-based district with a 55% black population was not acceptable to the Governor. As later noted, an Orleans-based district with a 55% white population encountered no objection.

Id. at 333. *See also Morris v. Gressette*, 432 U.S. 491, 506-507 (1977) ("where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation").

A. Congress Did Not Authorize The Attorney General To Recommend Redistricting Plans; Therefore The Failure Of North Carolina To Adhere To A Plan Referenced By The Attorney General Has No Relevance To A Finding Of Discriminatory Intent.

Section 5 provides for the submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c (1982). "The Attorney General does not act as a court in approving or disproving the state legislation. . . The provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969). The Attorney General's role is limited to determining whether a submitted plan is free of discriminatory purpose or effect. 28 C.F.R. 51.52 (1987).

Congress has not authorized and the Attorney General does not recommend redistricting plans to covered jurisdictions during the submission process. However, the Attorney General does seek to determine the extent to which the jurisdiction afforded members of racial and language

minority groups an opportunity to participate in the decision making process. 28 C.F.R. 51.57 (1987). In determining the extent of minority participation the Attorney General reviews alternative plans that were presented to the legislature for consideration and the legislature's reason for rejecting these alternatives. However, the Attorney General cannot actually recommend a specific plan.[4] Therefore, the failure of North Carolina to adhere to a plan referenced by the Attorney General has no relevance to a finding of discriminatory intent.

B. North Carolina's Congressional Redistricting Plan Is Not Invidiously Discriminatory.

Forty North Carolina counties are subject to § 5 of the Voting Rights Act, 28 C.F.R. 51 (1987). Therefore, North Carolina is required to obtain preclearance of any statewide redistricting plan before the plan may be implemented. Under § 5, North Carolina has the burden to establish that an electoral change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1982). It was with the intent to comply with § 5 that North Carolina adopted a congressional redistricting plan with two majority African-American districts.[5]

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[4] The power of the Attorney General to recommend specific redistricting plans would raise serious constitutional concerns. The Attorney General would be acting as a super-legislature with no obligation to adhere to state interests and with more authority than this Court has provided the federal courts when remedying constitutional violations. *See Upham v. Seamon*, 456 U.S. 37 (1982).

[5] The appellants contend that the proviso in § 2 of the Voting Rights Act "(t)hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population," 42 U.S.C. § 1973 (1982), prevents North Carolina from creating two majority African-American districts. However, Congress adopted this proviso out of a concern that amended § 2 would be interpreted as a guarantee of proportional representation for minority voters. S. Rep. No. 417, 97th Cong., 2d Sess. 30-31 (1982). Although the Act does not insure proportional representation, neither the Act nor this proviso limits the number of majority minority districts a jurisdiction may affirmatively create. As discussed *infra.*, a jurisdiction's decision to create majority minority districts is constrained only by the Constitution, the Voting Rights Act and state law. The issue of whether the unnecessary creation of majority minority districts violates the Constitution and the Voting Rights Act through the packing and fragmenting of minority populations is pending before this Court. *Voinovich v. Quilter, appeal pending*, No. 91-1618.

There is no allegation by African-American or other minority voters that the congressional redistricting plan adopted by North Carolina was the product of invidious discrimination.[6] The challenge to the plan was filed by white voters who allege that the creation of the two African-American districts is discriminatory. However, the appellants can point to no authority that supports their claim that the redistricting plan was a product of invidious discrimination.

As correctly noted by the district court, the appellants cannot establish the requisite intent for equal protection and Fifteenth Amendment purposes—"a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice." J.S. App. A at 23a. The appellants could not prove "that creation of the two 'grotesque' black-majority districts . . . has operated to fence out the white population of the state, or either of the two challenged districts, from participation in the political processes of the state or districts, nor to minimize or unfairly cancel out white voting strength." J.S. App. A at 23a. Moreover, "the plan will not lead to proportional

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[6] In the November, 1992 elections, held under the challenged plan, two African-Americans, Eva M. Clayton and Melvin L. Watt, were elected to Congress, becoming the first African-Americans elected to Congress from North Carolina since 1898. B. Ragsdale & J. Treese, *Black Americans in Congress, 1870-1989* (1990).

underrepresentation of white voters on a statewide basis." J.S. App. A at 24a.[7]

The only injury claimed by the appellants is that the African-American majority in the First and Twelfth congressional districts may elect a different representative than white voters, if the latter were in the majority. However, this Court has held that "the mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political process." *Whitcomb v. Chavis*, 403 U.S. 124, 154-155 (1971).

In addition, the appellants cannot establish that the North Carolina redistricting plan violated their rights to equal protection. In *Rogers v. Lodge*, 458 U.S. 613 (1982), this Court affirmed a finding that African-American voters had established that elections in Burke County, Georgia, diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments to the Constitution. The Court considered several factors to be relevant in determining that the challenged electoral system intentionally discriminated against African-American voters: the impact of past discrimination on the ability of blacks to participate effectively in the political process; evidence of exclusion of blacks from the political process; the unresponsiveness and insensitivity of white elected officials to the needs of the black community and the depressed socio-economic status of blacks. *Id.* 458 U.S. at 624-626.

These factors should also be relevant to a claim by white voters that an electoral system violates their Four-

[7] The 1992 election results support this finding. Although whites comprise 75% of North Carolina's population, white candidates won 10 of 12 congressional districts and 144 of 170 state legislative districts.

teenth Amendment rights. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 289-290 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal"). Since appellants cannot prove that the majority white North Carolina General Assembly intentionally discriminated against white voters, that white voters have been excluded from the political process or that white elected officials have been unresponsive or insensitive to their needs, appellants cannot succeed on their "reverse discrimination" claim.[8]

1. United Jewish Organizations *Establishes That Compliance With § 5 Necessitates the Use of Racial Considerations in Drawing District Lines.*

The district court's decision is consistent with this Court's jurisprudence. It is well established that a legislative body may consider race in drawing district lines, so long as it does not discriminate invidiously, have a discriminatory effect on minority voters or contravene the one person, one vote standard. *See Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980) (". . . a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation"). The Constitution does not prevent a jurisdiction from deliberately creating or preserving African-American majorities in particular dis-

[8] This Court's precedent on minority vote dilution claims under the Fourteenth and Fifteenth Amendments would seem to preclude the ability of white voters to establish the necessary elements to succeed on a constitutional vote dilution claim as white voters. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). However, this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), leaves open the possibility that white voters, as members of a political party, could succeed on an equal protection claim alleging partisan discrimination.

tricts to comply with the requirements of § 5. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977); *Beer v. United States, supra.*

In *United Jewish Organizations*, white voters challenged the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General. The district court dismissed the complaint reasoning that the redistricting did not disenfranchise petitioners and that racial considerations were permissible to correct past discrimination. *United Jewish Organizations v. Wilson*, 377 F. Supp. 1164, 1165-1166 (E.D.N.Y. 1974). The Court of Appeals affirmed, noting that the redistricting plan "left approximately 70% of the state senate and assembly districts in Kings County with white majorities; given that only 65% of the population of the county was white, the 1974 plan would not underrepresent the white population, assuming that voting followed racial lines." *United Jewish Organizations v. Wilson*, 510 F.2d 512, 523 n.21 (2d Cir. 1975). This Court affirmed. *United Jewish Organizations v. Carey, supra.*

A plurality of the Court reasoned:

> Implicit in *Beer* [*v. United States*, 425 U.S. 130 (1976)] and *City of Richmond* [*v. United States*, 422 U.S. 358 (1975)], then is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. **That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments.** We are unwilling to overturn our prior cases, however. Section 5 and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional . . . (N)either the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment.

U.J.O., 430 U.S. at 161. (emphasis added).

The plurality decision in *U.J.O.* is consistent with the intent of § 5 of the Voting Rights Act. During congressional hearings on the Voting Rights Act, examples of egregious voting discrimination were brought to the attention of Congress and it was determined that measures such as § 5 would be necessary to eliminate the vestiges of discrimination. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., 10-11 (1965); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 8, 12 (1965). *See also Allen v. State Board of Elections*, 393 U.S. at 548 ("Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress . . . enacted § 5"). To allow appellants to succeed on their claim would contravene. *U.J.O.* and undercut § 5 and the Voting Rights Act.

North Carolina's attempt to reflect the voting strength of African-American voters is consistent with congressional intent and this Court's precedent. The Court should reject appellants' and Washington Legal Foundation *amici* invitation to overturn *U.J.O.* The Court should also reject any argument that it is impermissible for a jurisdiction to create electoral districts that enhance minority voting strength.

2. *North Carolina's Use of Racial Criteria Is Benign and Not Inconsistent with This Court's Recent Pronouncement on the Use of Racial Preferences.*

The appellants and the Republican National Committee *amicus* assert that North Carolina's use of race creates a presumption of unconstitutionality that can be overcome by a compelling state interest. Although we disagree that a state must show a compelling state interest

before establishing a majority minority district, a state subject to § 5 clearly has a compelling state interest.[9]

Almost a century ago this Court described the right to vote as fundamental because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights . . . even the most basic are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Unfortunately, for a large number of American citizens the right to vote remained illusory until the passage of the Voting Rights Act in 1965. 42 U.S.C. § 1973 (1982). Through the vigilant enforcement of the Act's provisions by the federal courts and the Department of Justice and compliance by the States the right of minority citizens to participate in the political process is becoming a reality. The Republican National Committee *amicus* and the Washington Legal Foundation *amici*, although couching their argument in terms of improper racial classification, actually seek, albeit indirectly, to reverse the enormous gains that African-Americans, Latinos and Asians have made in the political process. If white voters can challenge the creation of majority minority districts on the grounds of reverse discrimination, every majority minority district in this Nation may be placed in jeopardy.

North Carolina's use of race, as a covered jurisdiction, was benign and clearly within the bounds established by this Court to remedy past discrimination. The creation of the two majority African-American districts was not an impermissible "racial quota."

This Court has held that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990). In *Metro Broadcasting*, this Court held that "benign race conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.* at 3008-3009. Alternatively, in *City of Richmond v. Croson*, 488 U.S. 469 (1989), a majority of the Court held that a jurisdiction's use of racial classifications is suspect and requires a showing of a compelling governmental interest.

[9] The Democratic National Committee, et al. *amici* suggest that all jurisdictions are required to consider race in the districting process, but regardless of this Court's view on such use of race by a jurisdiction not subject to § 5, a jurisdiction subject to § 5 has a legitimate and compelling state interest to utilize race.

Irrespective of the equal protection standard this Court deems applicable, the North Carolina congressional plan is constitutional. The benign race conscious districting employed by North Carolina and precleared by the Department of Justice was mandated by Congress. It is beyond doubt that ensuring the right to cast a meaningful vote serves important governmental objectives and that § 5 of the Voting Rights Act is substantially related to achievement of these objectives.

This Court has previously held that promoting diversity of views is an important and permissible government objective within the power of Congress. *Metro Broadcasting Inc. v. F.C.C., supra.* In *Metro Broadcasting Inc.* the Court reasoned that it is "a legitimate inference for Congress . . . to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves." *Id.* 110 S.Ct. at 3018. Promoting diversity of views in legislative chambers—at least as important as seeking diversity in the media—is an important rationale of the Voting Rights Act. The Act has allowed millions

of minority citizens to fully participate in the political process and to elect candidates of their choice.[10]

In addition, under even a strict scrutiny test, the State of North Carolina has a compelling state interest to ensure that African-Americans are fairly represented in the political process. Official racial discrimination denied African-Americans the opportunity to participate in the electoral process and resulted in Congress determining that a large section of North Carolina would be subject to § 5 of the Voting Rights Act. The lingering effects of that discrimination has continued to deny African-American voters the opportunity to equally participate in the political process and elect representatives of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

The fact that a jurisdiction subject to the provisions of § 5 seeks to ensure that the African-American community will be provided an opportunity to elect candidates of their own choosing to the United States Congress, cannot give rise to a constitutional violation, especially when the creation of the two majority minority districts do not place any undue burdens on non-minorities.[11] *Fullilove v. Klutznick*, 448 U.S. at 472.

Moreover, the appellants' arguments rest on a flawed premise. Unlike the minority set-aside at issue in *Croson*, *supra*, the allocation or distress sale of broadcast licenses in *Metro Broadcasting*, *supra*, or the admissions program in *Bakke*, *supra*, the creation of a majority African-American congressional district does not bar or exclude a

[10] Since the passage of the Act, the number of African-American and Hispanic elected officials in the United States has increased dramatically to more than 11,000. *See* National Association of Latino Elected and Appointed Officials, *National Roster of Hispanic Elected Officials* (1991); Joint Center for Political and Economic Studies, *Black Elected Officials, A National Roster* (1991).

[11] The appellants are not being denied the right to vote or to elect a candidate of their choice. They are simply placed in a district where a majority of the electorate is African-American.

white individual from representing the district. North Carolina did not guarantee that two African-Americans will be elected at the expense of white candidates, but simply that African-American voters, if they vote cohesively, could elect two Members of Congress of their choice although not necessarily of their race. North Carolina's action is consistent with the requirement of § 5 that minority voters be provided an opportunity to participate in the political process free of discrimination.

II. REDISTRICTING INVOLVES FUNDAMENTAL STATE INTERESTS AND ACCORDINGLY, THE JUDICIARY SHOULD DEFER TO STATE POLICY NOT IN CONFLICT WITH FEDERAL OR STATE LEGAL REQUIREMENTS.

The courts have a limited role in the redistricting process. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("we say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court"). A court in reviewing a redistricting plan "should not pre-empt the legislative task nor intrude upon state policy any more than necessary." *White v. Weiser*, 412 U.S. 783, 795 (1973).

North Carolina's creation of two congressional districts was pursuant to a legitimate state policy that sought to recognize African-American communities of interests without unduly disrupting existing congressional districts and their incumbents. It is permissible for North Carolina, or any other jurisdiction, to consider race in the districting process and establish majority minority districts wherever it desires, provided the creation of such districts does not dilute minority voting strength in neighboring districts or violate the requirements of one person, one vote.

In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court upheld a redistricting plan that sought to provide

proportional representation in the legislature to the two main political parties. The Court recognized in *Gaffney* that "politics and political considerations are inseparable from districting and apportionment" and held that:

> neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls . . .

Id. 412 U.S. at 754. Similarly, North Carolina sought to recognize the political strength of African-American voters by providing a "rough sort of proportional representation."

The *Gaffney* Court also questioned the wisdom of simply drawing districts based on some set of neutral criteria:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Id. 412 U.S. at 754. Justice White's comments apply equally to the use of race in the districting process. The racial composition of districts are well known and ignoring racial data could result in the "most grossly racial gerrymandered districts." *Id.*

The protection of inumbents while complying with the Voting Rights Act was held to be a legitimate state policy in *Anne Arundel County Republican Central Committee v. State Advisory Board of Election Laws*, 781 F. Supp. 394 (D.Md. 1991), *aff'd*, 112 S.Ct. 2269 (1992). In *Anne Arundel County Republican Central Committee* the court reasoned:

> this Court defers to Maryland's legislature . . . (which) aimed to give Congressman Hoyer, a congressman with high ranking and importance . . . a safe seat, to provide the majority black population in . . . Prince George's and Montgomery counties with a chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congresswoman Bentley and Congressman Cardin.

Id. 781 F. Supp. at 398. Although incumbency protection is a legitimate state policy, it may not be accomplished at the expense of minority voting strength. *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991). No one has alleged that North Carolina's protection of incumbents was accomplished at the expense of minority voting strength.

The appellants and Republican National Committee argue that the failure of North Carolina to follow neutral criteria is fatal to the plan. However, courts have been reluctant to require jurisdictions to follow such an ill defined concept as neutral criteria. "(T)o mandate that a legislature reapportion with regard merely to neutral criteria . . . is to give that legislature in practice no guidance at all. Indeed it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting." *Anne Arundel County Republican Central Committee*, 781 F. Supp. at 399; *See also Gaffney v. Cummings, supra.*

Court drawn plans, on the other hand, are afforded less deference than legislatively drawn plans.[12] Courts are re-

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[12] *See Carstens v. Lamm*, 543 F. Supp. 68, 82 (1983) ("Courts are often faced with situations in which several different redistricting plans achieve virtually identical levels of population equality

quired to adhere more strictly than state legislatures to those constitutional and statutory standards governing the redistricting process. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). A function of a court in adopting a redistricting plan is therefore much different from that of a state legislature. *Burton v. Sheehan*, 793 F. Supp. 1329 (D.S.C. 1992). "This is chiefly because a state legislature is better situated to identify and recommend traditional state policies within the constitutionally mandated framework of substantial population equality. . . In sharp contrast. this Court possesses no distinctive mandate to compromise potentially conflicting state redistricting policies in the people's name." *Id.* (*quoting Connor v. Finch*, 431 U.S. 407, 414-415 (1977)).

Redistricting of legislative bodies is fundamentally a "legislative task which federal courts should make every effort not to pre-empt," *Wise*, 437 U.S. at 539. Since legislatures are better situated to determine state policy, including defining communities of interest and determining whether to adhere to a particular compactness requirement, a court's review of such policy should be extremely limited. A court should look no further than to determine whether the proffered state policy is rational and whether the plan is in compliance with federal and state law. Courts drawing plans, on the other hand, should apply a greater level of scrutiny to ensure impartiality in such a highly political process.

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without substantially diluting minority rights. In these cases, no reasoned decision can be based solely on these two constitutional criteria. The court must accommodate other relevant criteria in determining whether to accept a proposed plan or to adopt a new one"); *Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM (D.Az. May 6, 1992) ("Once the constitutional and Voting Rights Act standards are met a court may look to several neutral criteria"); *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

III. FEDERAL LAW DOES NOT REQUIRE THAT DISTRICTING PLANS COMPLY WITH ANY "NEUTRAL CRITERIA".

A congressional redistricting plan is required to comply with the requirements of one person, one vote, the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[13] North Carolina's congressional redistricting plan is not violative of any of these provisions.[14] Although there is no federal requirement that a congressional redistricting plan satisfy any additional criteria, it is alleged that the "odd configurations" of the congressional districts violates appellants' constitutional rights.[15]

Congress has occasionally imposed on States certain redistricting standards for congressional districts.[16] In

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[13] Many state constitutions and statutes provide additional legal standards for state legislative redistricting. North Carolina, for example, requires that all state legislative districts consist of contiguous territory. N.C. Const. art. II, § 3 and § 4. However, North Carolina, like most other states, does not provide any additional requirements for congressional redistricting. National Conference of State Legislatures, *Redistricting Provisions: 50 State Profiles* (1989).

[14] This Court affirmed a district court's ruling dismissing a partisan gerrymandering challenge filed on behalf of Republicans. *Pope v. Blue*, Civ. No. 3:92CV71-P (W.D.N.C. April 15, 1992), *aff'd* 113 S.Ct. 30 (1992). In addition, there has been no claim that the plan is violative of either the Voting Rights Act or equal population requirements. The only challenge presented in this appeal is that the plan somehow violates the equal protection of white voters.

[15] The failure to adhere to neutral criteria may be evidence of invidious discrimination against a protected class, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or against a particular group. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77 (1985). Nevertheless, uncouth or irregularly shaped districts are not in and of themselves constitutionally suspect. *Badham v. Eu*, 694 F. Supp. 664, 671 (N.D. Cal. 1988), *aff'd* 109 S. Ct. 829 (1989).

[16] The Apportionment Act of 1911, 37 Stat. 13 (1911), provided:

> That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third

the Apportionment Act of 1929, 46 Stat. 21 (1929), Congress omitted any requirement that congressional districts consist of contiguous and compact territory. This Court, in *Wood v. Brown*, 257 U.S. 1 (1932), reviewed the legislative history of the 1929 Act and held that "it was manifestly the intention of the Congress not to reenact the provision as to compactness, contiguity and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929." *Id.* 257 U.S. at 7.

Since 1929, Congress has chosen to leave to the states the criteria to be employed in redrawing election boundaries and has declined to reimpose any requirements for congressional districts. 2 U.S.C. § 2a (1990). No federal statute presently requires that districts be compact, contiguous, recognize communities of interest or preserve political subdivision boundaries. Congress has recognized that state and local legislatures are better equipped to determine these other factors than Congress or any national agency. Celler, *Congressional Apportionment—Past, Present and Future*, 17 Law & Contemp. Probs. 268, 274 (1952).

This Court, on the other hand, has held that minority plaintiffs cannot succeed on a vote dilution claim unless they can establish that they are geographically compact. *Thornburg v. Gingles*, 478 U.S. at 50-51. Although a jurisdiction has wide discretion in the drawing of congressional districts, a court's discretion, as recognized by this Court in *Gingles*, is more narrow. A court may not order a jurisdiction to draw minority districts that are not geographically compact. However, if a jurisdiction decides to recognize a community of interest, a court may not reject the jurisdiction's decision for failing to comply with some aesthetic norm.

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and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory. . .

The appellants and Republican National Committee *amicus* contend that the Twelfth Congressional District completely diverges from any rational redistricting principles. However, assuming such principles are required, the Twelfth District, despite its odd shape, is still compact—the district recognizes a community of interest, mainly urban African-Americans with similar concerns and interests, is easily traversed and has less land area than any other North Carolina congressional district.

IV. ALL JURISDICTIONS HAVE UTILIZED RACIAL CRITERIA IN THE DRAWING OF NEW LEGISLATIVE AND CONGRESSIONAL DISTRICTS FOLLOWING THE 1990 CENSUS AND A REVERSAL OF THE DISTRICT COURT'S DECISION WILL SEVERELY DISRUPT THE POLITICAL PROCESS AND PLACE IN JEOPARDY NEARLY ALL MAJORITY MINORITY DISTRICTS.

As this Court is well aware, all jurisdictions utilize racial criteria in the districting process. The Census Bureau provides racial and ethnic data to the states pursuant to 2 U.S.C. 2a (1990) and 13 U.S.C. 141 (1990). As a result, the racial composition of all districts is easily attainable.

The 1990 redistricting process has led to enormous gains in the number of minority elected officials. Alabama, Florida, North Carolina, South Carolina and Virginia elected African-Americans to the Congress for the first time in the Twentieth Century. The 103rd Congress is the most ethnically and racially diverse Congress in our Nation's history.[17] This diversity is the result of an increase in the number of districts with significant minority population.[18]

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[17] The 103rd Congress includes 38 African-Americans, 17 Latinos and 4 Asians, excluding Delegates. This is an overall increase of 22 from the 102nd Congress.

[18] Due to the continued existence of legally significant racially polarized voting in numerous jurisdictions, minority representatives,

The continued diversity of our Nation's legislatures is threatened by this pending claim. If the appellants succeed and the district court's decision is reversed, the validity of countless minority districts will become suspect. The disruption to the political process would be immense due to the numerous challenges to existing districts that would be sure to follow. In addition, legislators, especially in states subject to § 5, would be placed in an untenable situation: To comply with the Voting Rights Act racial considerations are necessary, on the other hand, a legislature's discretion would be severely limited and continuously subject to challenge.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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with limited exceptions, are only elected from districst that contain close to or an absolute majority of minority voters. There are exceptions however, such as the State of Ohio where every state house district in excess of 35% African-American has elected an African-American. *Voinovich v. Quilter, appeal pending*, No. 91-1618, J.S. App. 141a.